Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

LELAND BROWN, GENE LAMBERT, MALCOLM HARWOOD, STANFORD MAGIDSON, and JOHN R. BRODRIB,

Petitioners,

vs.

PACIFIC BELL DIRECTORY, a corporation,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Federal Employee Retirement Income Security Act (ERISA) provides it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Even though this Court has afforded ERISA preemption a broad sweep, it has consistently "recognized limits to ERISA's preemption clause." *Ingersoll-Rand v. McClendon* 498 U.S. 133, 139 [112 L.Ed. 2d 474, 484, 111 S.Ct. 478, 483] (1990); *Shaw v. Delta Air Lines* 463 U.S. 85, 96-97 [77 L.Ed. 2d 490, 103 S.Ct. 2890, 2900] (1983).

The first issue presented here is whether an employee's state law claim for wrongful termination – which is not based on an employer's plan-defeating motive, which does not seek plan benefits, and which does not affect the plan – is nevertheless preempted by ERISA, merely because the employer induced the employee to resign through a fraudulent representation regarding its pension plan.

2. The second issue presented is whether denying Petitioners a forum for their wrongful termination claim in both state and federal court constitutes a deprivation without due process of law, prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

The parties to this proceeding are petitioners Leland Brown, Gene Lambert, Malcolm Harwood, Stanford Magidson, and John R. Brodrib, and respondent Pacific Bell Directory.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Leland Brown, Gene Lambert, Malcolm Harwood, Stanford Magidson, and John R. Brodrib ("petitioners") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth District, Division Three, entered in the above proceeding on March 10, 1999.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth District, Division Three is not published. It is reprinted in the Appendix to this Petition at pages 1 to 10. The unreported order denying the petition for rehearing appears at pages 22 to 23, and the unreported order denying the petition for review at page 24.

STATEMENT OF JURISDICTION

The judgment of the California Court of Appeal was rendered on March 10, 1999. A petition for rehearing was timely filed, and denied on April 6, 1999. A petition for review to the California Supreme Court was timely filed, and denied on May 26, 1999. Justices Mosk and Kennard were of the opinion the petition should be granted.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Federal Employee Retirement Income Security Act (ERISA) provides, in relevant part, that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

2. The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

3. The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law;. . . . "

STATEMENT OF THE CASE

In the 1980's, Pacific Bell Directory ("Pacific") told its employees – Petitioners Leland Brown, Gene Lambert, Malcolm Harwood, Stanford Magidson, and John R. Brodrib ("Petitioners") – that their pension benefits would be based upon the highest amount of income earned during the last 36 months of employment. Petitioners, ranging in age between 52 and 60, enjoyed relatively high salaries, primarily due to commissions earned from selling yellow-page advertisements. Pacific's representation regarding the plan was incorrect. Pacific Telesis – Pacific's parent company and administrator of the pension plan – repeatedly informed Pacific there was a "no

reductions" clause in the pension plan, entitling Petitioners to the highest level of benefits due, regardless of whether their income level decreased before retirement. Pacific ignored this information, and did not inform Petitioners.

In 1990, Petitioners realized their glory days were soon to end: Pacific changed its commission structure, the economy took a turn for the worse, and the amount of competition increased. Believing their pension benefits were at risk, Petitioners asked their managers and Pacific's Labor Relations Department specific questions about the pension plan's terms. They were told by Pacific that they would have to retire earlier than they expected in order to ensure maximum pension benefits. With the help of Pacific's Labor Relations Department, Petitioners planned the best date to retire. The last Petitioner of the group retired in May 1993. The next month, Petitioners learned there was in fact no need to retire early because the pension plan included a "no reductions" clause. Petitioners immediately asked Pacific to be rehired. Pacific refused.

In December, Petitioners filed the underlying lawsuit against Pacific, alleging fraud, negligent misrepresentations, negligence, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and wrongful termination. Petitioners claimed Pacific wrongfully forced them into early retirement by misrepresenting their pension benefits. They sought loss of earnings for the years they would have continued working. They did not claim they were entitled to additional pension benefits.

Pacific removed the case to a federal district court, but the judge determined the court lacked subject matter jurisdiction and remanded the case back to the state superior court.[1] Petitioners moved for summary adjudication that Pacific's affirmative defense of ERISA preemption was without merit. Pacific then moved for summary adjudication, arguing ERISA preempted Petitioners' claims. The trial court disagreed with Pacific, and agreed with Petitioners' ruling, "ERISA preemption, as broad as it is, is not absolute. The court finds that plaintiffs' claims are too remote, tenuous and peripheral to the . . . plan to be preempted. While the remand order of the Honorable William J. Rea, Judge of the U.S. District Court, is not controlling, the court finds Judge Rea's analysis helpful and on point. The plan itself is not a critical factor in determining liability. Plaintiffs' claims are not for lost rights under the plan. Plaintiffs do not claim they failed to receive all benefits to which they were entitled under the plan. Plaintiffs claim defendant's motivation is aimed at denying plaintiffs their jobs not plan rights nor benefits. . . . Defendants have presented no evidence of a plan

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[1] The district court ruled, "Based upon the facts and allegations contained in the papers, the court is inclined to find that the existence of the . . . [plan] is not a critical factor in establishing liability. Furthermore, there appears to be no reason why a court would need to find that Pacific had a 'pension-defeating motive' in terminated plaintiffs' employment because neither party has raised that issue here. Plaintiffs have been paid their full benefits, and allege that Pacific had only a job-defeating motive. Thus, a court could allow plaintiffs to recover without ever having to consider the plan. . . . [The] state law claims . . . are not 'related to' an ERISA plan. . . . " See Appendix p. 13.

defeating motive, as opposed to a job defeating motive, in the defendant's conduct." Appendix pp. 19-20.

Pacific petitioned the Court of Appeal, raising the same preemption argument. The Court of Appeal denied the writ. The case proceeded to trial. The jury found in Petitioners' favor, awarding over $2,000,000 by special verdict. Pacific moved for judgment notwithstanding the verdict, again arguing the claims were preempted. The court denied the motion.

The Court of Appeal reversed the judgment. The Court of Appeal acknowledged that Petitioners were not seeking any benefits under the pension plan. It further acknowledged that Pacific's motivation may have been to eliminate the Petitioners' jobs. Nevertheless, the Court of Appeal concluded that existence of the plan was "plainly 'critical to the case.' Accordingly, we find the employees' claims necessarily 'relate to' an ERISA plan and are therefore preempted." Further, the Court of Appeal found the fact Petitioners would be left without a remedy to have "no bearing" on its analysis. Appendix pp. 1-10.

The Court of Appeal denied Petitioners' petition for rehearing and request for publication. Appendix pp. 22-23. The California Supreme Court denied Petitioners' petition for review. Two justices – Mosk and Kennard – were of the opinion the petition should be granted.[2] Appendix p. 24.

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[2] Review by the California Supreme Court of a decision of a Court of Appeal may be granted by an order signed by at least four of the seven justices. Cal. Rules of Court, rule 28(f).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case presents issues to which rule 10(c) applies, i.e., the California Court of Appeal decided important questions of federal constitutional law which have not been, but should be, settled by this Court, namely (1) whether an employee's state law claim for wrongful termination – which is not based on an employer's plan-defeating motive, does not seek plan benefits, and does not affect the plan – is nevertheless preempted by ERISA, merely because the employer, at odds with the plan administrator, induced the employee to resign through a fraudulent representation regarding its pension plan and, (2) whether denying Petitioners a forum for their wrongful termination claim in both state and federal courts is a deprivation without due process of law, prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

ERISA is a comprehensive legislative scheme "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, supra,* 463 U.S. at p. 90 [77 L.Ed. 2d 490, 103 S.Ct. at p. 2896]. Through enactment of ERISA, Congress also sought to protect the interests of employers, by "eliminating the threat of conflicting and inconsistent State and local regulation of employee benefit plans." *Id.*, at p. 99 [103 S.Ct. at p. 2901]. Accordingly, ERISA expressly provides for the preemption of "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan." 29 U.S.C. § 1144(a), emphasis added.

Analysis of the preemption issue has focused on the "relate to" language of the preemption provision. *Ingersoll-Rand v. McClendon, supra,* 498 U.S. at p. 138 [112 L.Ed.

2d at p. 483, 111 S.Ct. 478]. However, as this Court recently acknowledged, it has regularly endeavored to interpret and apply the " 'unhelpful text' of ERISA'S pre-emption provision." *Cal. Labor Stds. Enforcement v. Dillingham Const.* 519 U.S. 316, 324 [136 L.Ed. 2d 791, 799, 117 S.Ct. 832] (1997). As at least one Justice candidly acknowledged, "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else. [Citations.] The statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended – which it is not." *Id.*, at pp. 336-337 [136 L.Ed. at p. 806] (Scalia, J., concurring).

The confused state of the law regarding the scope of ERISA preemption, and the resulting draconian consequences, is epitomized by the present case. Petitioners, long-time Pacific employees, were told by Pacific that, unless they retired immediately, they would not enjoy full pension benefits if their commission declined. Relying on Pacific's representations, Petitioners retired. Pacific had in fact lied. When Petitioners discovered the truth, they brought an action against Pacific alleging state causes of action for, among others, fraud and wrongful termination. Pacific removed the case to federal district court. The district court remanded the case back to state court, finding that Petitioners' state law claims were not "related to" an ERISA plan. Petitioners then moved for summary adjudication in state court on Pacific's preemption affirmative defense. The superior court granted summary adjudication, finding that Petitioners' claims were too remote, tenuous, and peripheral to the plan to be

preempted. The case proceeded to trial, and the jury awarded plaintiffs over $2 million in damages for loss of earnings.

The Court of Appeal reversed. Unlike the federal district court and state superior court, it found that Petitioners' claims necessarily "relate to" an ERISA plan, and are therefore preempted, merely because Pacific had made a misrepresentation regarding its pension plan in order to induce Petitioners' early retirement. It further found that the fact Petitioners were left without a remedy for Pacific's misconduct to be irrelevant.

The Court of Appeal's opinion is erroneous, and was prompted by the confused state of the law. As explained below, ERISA preemption does not apply to Petitioners' cause of action for wrongful termination, where, as here, their claim is not based on an employer's plan-defeating motive, does not seek plan benefits, and has no effect upon the administration of the plan. Petitioners were never denied their pension benefits. To the contrary, they were coerced into accepting them. Petitioners lost their jobs, not their benefits. Simply put, such claims do not "relate to" any employee benefit plan.

ERISA preemption serves an important purpose: it "establishes pension plan regulation as exclusively a federal concern." *Ingersoll-Rand v. McClendon, supra,* 498 U.S. at p. 138 [112 L.Ed. 2d at p. 483, 111 S.Ct. at p. 482]. However, ERISA preemption is not without boundaries. Paraphrasing Mr. Justice White, the word "ERISA" is not a mere talisman in whose presence state court jurisdiction fades away and disappears. Cf., *Coolidge v. New Hampshire* 403 U.S. 443, 461 [29 L.Ed.2d 564, 580, 91 S.Ct. 2022]

(1971); see also, *Forbus v. Sears Roebuck & Co.* 30 F.3d 1402, 1405 (11th Cir. 1994) ["the mere existence of an ERISA plan is not enough for preemption"].

This Court should grant certiorari to settle this important area of the law. Otherwise, litigants in both state and federal courts will remain, as they are now, at the risk of multiple conflicting rulings on preemption, and the final draconian and unconstitutional consequence of losing all forums for their claims.

LEGAL DISCUSSION

I.

AN EMPLOYEE'S STATE LAW CLAIM FOR WRONGFUL TERMINATION – WHICH IS NOT BASED ON THE EMPLOYER'S PENSION-DEFEATING MOTIVE, WHICH DOES NOT SEEK PENSION BENEFITS, AND WHICH DOES NOT AFFECT THE PLAN – IS NOT PREEMPTED BY ERISA.

ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan." 29 U.S.C. § 1144(a), emphasis added. Analysis of ERISA's preemption provision has focused on the "relate to" language, yielding a two-part inquiry: "A law 'relates to' a covered employee benefit plan for the purposes of § 514(a) if it (1) has a connection with or (2) reference to such a plan." *Cal. Labor Stds. Enforcement v. Dillingham Const., supra,* 519 U.S. at p. 324 [136 L.Ed. 2d at p. 799, 117 S.Ct. 832], internal quotations and citations omitted; *Southern Cal. Ch. of Associated*

Builders, etc. Com. v. California Apprenticeship Council 4 Cal.4th 422, 441 (1992).

Even though this Court has afforded ERISA preemption broad latitude, it has consistently "recognized limits to ERISA's preemption clause." *Ingersoll-Rand v. McClendon, supra,* 498 U.S. at p. 139 [112 L.Ed. 2d at p. 484, 111 S.Ct. at p. 483]; *Shaw v. Delta Air Lines, supra,* 463 U.S. at pp. 96-97 [77 L.Ed. 2d 490, 103 S.Ct. at p. 2900]. Thus, some laws may affect employee benefit plans in "too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, supra,* 463 U.S. at p. 100, fn. 21 [77 L.Ed.2d 490, 103 S.Ct. at p. 2901, fn. 21]. "[T]he mere existence of an ERISA plan is not enough for pr[illegible]tion." *Forbus v. Sears Roebuck & Co., supra,* 30 F.3d at [illegible]405.

One such limit on ERISA preemption has been recognized in wrongful termination cases. Specifically, courts have limited preemption to those cases where the employee claimed the employer terminated employment in order to avoid paying pension or health benefits, i.e, for a "pension-defeating motive," or where the employee's claim for damages is tied to the pension plan.

In *Ingersoll-Rand v. McClendon, supra,* 498 U.S. 133 [112 L.Ed.2d 474, 111 S.Ct. 478], this Court held that ERISA preempted a state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under a plan covered by ERISA:

> "Thus, in order to prevail, a plaintiff must plead, and a court must find, that an ERISA plan exists and the employer had a plan defeating motive in terminating the employment. Because

> the court's inquiry must be directed to the plan, this judicially created cause of action 'relate[s] to' an ERISA plan." *Id.*, at p. 140 [112 L.Ed.2d at p. 485].

The Federal Circuit courts have employed the same analysis. For example, in *Felton v. Unisource Group* 940 F.2d 503 (9th Cir. 1991), an employee sued his employer, alleging he was wrongfully discharged to avoid paying him medical insurance benefits under a plan covered by ERISA. The employee offered no other theories. Citing *Ingersoll-Rand*, the Ninth Circuit held the action was pre-empted by ERISA. *Id.*, at pp. 507-508. "It is well-settled in this circuit that a wrongful termination claim based on the theory that the employer intended to avoid pension or insurance payments is preempted by ERISA." *Id.*, at p. 508; see also, *Nishimoto v. Federman-Bachrach & Associates* 903 F.2d 709 (9th Cir. 1990) [wrongful termination claim was preempted by ERISA when plaintiff was terminated by her employer to prevent her from acquiring a vested interest in a retirement plan].

Similarly, in *Sorosky v. Burroughs, Corp.* 826 F.2d 794 (9th Cir. 1987), an employer terminated the plaintiff when it closed a major portion of its facility. The plaintiff brought an action for wrongful discharge and breach of contract, alleging several different theories. Some of the theories related specifically to the company's motive to prevent the plaintiff from acquiring pension benefits. Those claims were held to be preempted. The plaintiff's other theories – unrelated to the employer's plan-defeating motive – were not. *Id.*, at pp. 798, 800.

Here, Petitioners' claims are not based on a plan-defeating motive on the part of Pacific. As recognized by

the Court of Appeal, Petitioners' theory was that Pacific's misrepresentations were motivated by its desire to terminate Petitioners, not to avoid its obligations under the pension plan. The Court of Appeal, however, apparently concluded that Pacific's motive was irrelevant to a preemption determination. That is not the law. *Ingersoll-Rand v. McClendon, supra,* 498 U.S. at p. 140 [112 L.Ed.2d at p. 485, 111 S.Ct. 478] ["[I]n order to prevail, a plaintiff must plead, and a court must find, that an ERISA plan exists and the employer had a plan defeating motive in terminating the employment"]. Pacific's misrepresentations regarding the terms of the pension plan cannot be divorced from Pacific's motive for making those misrepresentations, i.e., to terminate Petitioners, a motive which does not "relate to" the plan.

Moreover, the Court of Appeal acknowledged, and then ignored, the fact that Petitioners did not seek or obtain any additional pension benefits as part of their lawsuit. Petitioners' only claim was for lost wages. However, "the danger of defeated expectations of wages for services performed [is] a hazard with which ERISA is unconcerned." *Cal. Labor Stds. Enforcement v. Dillingham Const., supra,* 519 U.S. at p. 327 [136 L.Ed. 2d at p. 801, 117 S.Ct. 832], internal quotations and citations omitted. Thus, while Pacific's misrepresentations touched on the pension plan, Petitioners' benefits under the plan were not the measure of damages, and cannot be used to establish a relationship between their lawsuit and the plan. Compare, *Sanson v. General Motors Corp.* 966 F.2d 618, 621 (11th Cir. 1992) ["The measure of damages would be the amount of benefits Sanson would have received

under the retirement plan. Such a determination of damages demonstrates the relationship between the lawsuit and the retirement plan"]. Here, Petitioners were never denied their pension benefits. To the contrary, they were coerced by their employer into accepting them. Petitioners lost their jobs, not their pension benefits.

As found by both the district court and superior court, Petitioners' claims are too remote, tenuous, and peripheral to the plan to be preempted. See, *Shaw v. Delta Air Lines, supra,* 463 U.S. at p. 100, fn. 21 [77 L.Ed.2d 490, 103 S.Ct. at p. 2901, fn. 21]. Petitioners were paid their full benefits, and demonstrated that Pacific had only a job-defeating motive. Thus, a court could allow Petitioners to recover without ever having to consider the plan. Indeed, the existence of the plan and its terms were not in dispute.

Courts must walk a "fine line" in determining whether wrongful termination actions are preempted. See, *AT&T Communications, Inc. v. Superior Court* 21 Cal.App.4th 1673, 1679 (1994). That line, while it exists, is anything but clear. Review by this Court is therefore necessary to clarify that an employee's claim for wrongful termination, which is not based on the employer's "plan-defeating motive," does not seek pension benefits, and does not affect the plan, is not preempted by ERISA, merely because the employee was induced to resign by the employer's misrepresentations regarding its pension plan.

II.

DENYING PETITIONERS A FORUM IN BOTH FEDERAL AND STATE COURTS IS A DEPRIVATION OF DUE PROCESS.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " The Fourteenth Amendment imposes a similar restriction on the states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law;. . . . " The fundamental requirement of due process is an opportunity to be heard. It is necessary that "the 'inexorable safeguard' . . . of a fair and open hearing be maintained in its integrity. . . . The right to such a hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement." *Ohio Bell Tel. Co. v. Public Util. Com.*, 301 U.S. 292, 304 [57 S.Ct. 724, 730, 81 L.Ed. 1093, 1101] (1939).

Petitioners have been deprived of their fundamental due process right to a hearing, having been denied a forum in both the federal and state courts, with the federal court saying Petitioners' action was not preempted by ERISA, and the state appellate court saying it was. Petitioners' position is not unique, but is a recurring consequence of ERISA's untoward expansion. Several lower courts – including the Court of Appeal here – have recognized this "gap" in the law, but failed to take any action to redress the constitutional infirmities of the present legislative scheme. See, e.g., *Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991); *Barr v. American Cyanamid Co.*, 808 F.Supp. 752, 760 (W.D. Wash. 1992).

This Court cannot overlook the draconian unconstitutional consequence of the Court of Appeal's opinion, which was to deprive Petitioners of a forum for their grievance in both federal and state courts. Petitioners did everything they could have done to insure they were in the proper forum for their claims. After the federal court remanded this matter for lack of jurisdiction, Petitioners sought, and obtained, a summary adjudication that their claims were not preempted by ERISA. The Court of Appeal summarily denied extraordinary relief, after which Petitioners expended their own resources and the court's time and expense in trying this case to a jury. A jury concluded Petitioners had been wronged, and awarded them damages. Now, as a result of the Court of Appeal's erroneous determination of preemption, Petitioners have been left without either a forum or a remedy.

Certiorari is thus appropriate to settle this important question of federal law. Rules of the Supreme Court of the United States, Rule 10(c).

CONCLUSION

For the reasons stated above, Petitioners pray for a writ of certiorari, to issue to the Court of Appeal of California.

Dated: August 18, 1989

Respectfully submitted,

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Attorneys for Petitioners, Leland Brown, Gene Lambert, Malcolm Harwood, Stanford Magidson, and John R. Brodrib

APPENDIX I

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LELAND BROWN et al., Plaintiffs and Respondents, v. PACIFIC BELL DIRECTORY, Defendant and Appellant.	G019921 (Super. Ct. No. 722268) OPINION (Filed March 10, 1999)

Appeal from a judgment of the Superior Court of Orange County, John H. Smith Jr., Judge. (Retired judge of the superior court, assigned by the Chief Justice pursuant to Cal. Const., art. VI, § 6.) Reversed.

Pillsbury, Madison & Sutro, Kevin M. Fong, Anthony R. Delling, John Y. Liu, Andrew L. Barber and R. Bart Kimball for Defendant and Appellant

MacAuley & Smart, Jack Smart, Dan J. MacAuley and Sharon L. Bilbeisi for Plaintiffs and Respondents.

* * *

Pacific Bell (Pacific) appeals from a judgment entered in favor of Leland Brown, Gene Lambert, Malcolm Harwood, Stanford Magidson and John R. Brodrib (collectively employees, unless otherwise indicated) in their

constructive discharge lawsuit. Pacific maintains the employees' state law claims are preempted by the Federal Employee Retirement Income Security Act (ERISA). (29 U.S.C. § 1001 et seq.) We agree.

I

In the 1980's, Pacific told its employees their pension benefits would be based upon the highest amount of income earned during the last 36 months of employment. The employees, ranging in age between 52 and 60, enjoyed relatively high salaries, primarily due to commissions earned from selling yellow-page advertisements.

In 1990, the employees realized their glory days were soon to end: Pacific changed its commission structure, the economy took a turn for the worse, and the amount of competition increased. Concerned their pension benefits were at risk, the employees asked their managers and Pacific's Labor Relations Department specific questions about the Pacific Telesis Group Pension Plan's (the plan's) terms. They learned they would have to retire earlier than they expected in order to ensure maximum pension benefits. With the help of Pacific's Labor Relations Department, the employees planned the best date to retire. The last employee of the group retired in May 1993.

The next month, the employees learned there was no need to retire early. The pension plan included a "no reductions" clause entitling them to the highest level of benefits due, regardless of whether their income level decreased before retirement. The employees immediately asked Pacific to be rehired. Pacific said no.

In December, the employees filed the underlying lawsuit against Pacific, alleging fraud, negligent misrepresentation, negligence, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and wrongful termination. The employees claimed Pacific wrongfully forced them into early retirement by misrepresenting their pension benefits. They sought loss of earnings for the years they would have continued working. They did not claim they were entitled to additional pension benefits.

Within a few days thereafter, Pacific had a change of heart and offered to rehire the employees. They accepted but retired the following month, on January 10, 1994, benefiting from a new early retirement plan.

Pacific removed the case to a federal district court, but the judge determined the court lacked subject matter jurisdiction and remanded the case back to the state superior court.[1] Pacific then moved for summary adjudication, arguing ERISA preempted the employees' claims. The trial court disagreed ruling, "ERISA preemption, as

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[1] The district court ruled, "Based upon the facts and allegations contained in the papers, the court is inclined to find that the existence of the . . . [plan] is not a critical factor in establishing liability. Furthermore, there appears to be no reason why a court would need to find that Pacific had a 'pension-defeating motive' in terminating plaintiffs' employment because neither party has raised that issue here. Plaintiffs have been paid their full benefits, and allege that Pacific had only a job-defeating motive. Thus, a court could allow plaintiff to recover without ever having to consider the plan. . . . [The] state law claims . . . are not 'related to' an ERISA plan. . . . "

broad as it is, is not absolute. The court finds that plaintiffs' claims are too remote, tenuous and peripheral to the . . . plan to be preempted. While the remand order of the Honorable William J. Rea, Judge of the U.S. District Court, is not controlling, the court finds Judge Rea's analysis helpful and on point. The plan itself is not a critical factor in determining liability. Plaintiffs' claims are not for lost rights under the plan. Plaintiffs do not claim they failed to receive all benefits to which they were entitled [ ] under the plan. Plaintiffs claim defendant's motivation is aimed at denying plaintiffs their jobs not plan rights nor benefits. . . . Defendants have presented no evidence of a plan defeating motive, as opposed to a job defeating motive, in the defendant's conduct."

Pacific petitioned this court, raising the same preemption argument. We denied the writ. The case proceeded to trial. The jury found in the employee's favor, awarding over $2,000,000 by special verdict. Pacific moved for judgment notwithstanding the verdict, again arguing the claims were preempted. The court denied the motion.

ERISA provides it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." (29 U.S.C. § 1144(a).) The question we must decide here is whether the employees' state tort claims "relate to" an ERISA employee benefit plan. We find they do.[2]

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[2] We reject the employees' assertion we must review the trial court's ruling pursuant to an "abuse of discretion"

As recently noted by the United States Supreme Court, "Since shortly after its enactment, we have endeavored with some regularity to interpret and apply the unhelpful text of ERISA'a pre-emption provision. [Citation.] We have long acknowledged that ERISA's pre-emption provision is clearly expansive. [Citations.] Our efforts at applying the provision have yielded a two-part inquiry: A law relate[s] to a covered employee benefit plan . . . if it (1) has a connection with or (2) reference to such a plan. [Citations.] Under the latter inquiry, we have held pre-empted . . . a common law cause of action premised on the existence of an ERISA plan. [Citation.]" (*Cal. Labor Stds. Enforcement v. Dillingham Const.* (1997) 519 U.S. 316, ___, internal quotation marks omitted.)

Farr v. US West, Inc. (9th Cir. 1995) 58 F.3d 1361 is instructive. There, several employees claimed their employer gave them false and misleading information regarding the tax consequences of their lump sum early retirement distribution. The district court ruled the employees' fraud and negligent misrepresentation claims were preempted by ERISA. The Ninth Circuit disagreed, explaining there are four types of state laws that are preempted: "(1) laws that regulate the type of benefits or terms of ERISA plans, (2) laws that create reporting, disclosure, funding, or vesting requirements, (3) laws that provide rules for calculation of the amount of benefits to be paid under ERISA plans, and (4) laws that provide

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standard. The trial "court's finding of no preemption is a legal question reviewed de novo. [Citation]" (*Inland Empire Chapter of Assoc. Gen. Contr. v. Dear* (9th Cir. 1996) 77 F.3d 296, 299, italics omitted.)

remedies for misconduct growing out of the administration of ERISA plans. [Citations.]" (*Farr v. US West, Inc., supra,* 58 F.3d at p. 1365.) The court determined the negligent misrepresentation claim did not fall into any of those categories. "Plaintiffs do not sue [their employer] under a state law that regulates the type of benefits or terms of the ERISA plan itself. Rather, plaintiffs allege fraud in [their employer's] advice about the tax consequences of lump sum distributions. Their claim does not relate to the reporting, disclosure, funding, or vesting requirements of the plan itself; it concerns the unsolicited and allegedly misleading tax advise. . . . Plaintiffs do not challenge the amount of benefits paid to them under an ERISA plan; rather, plaintiffs got their full benefits due under the . . . program. Finally, plaintiffs do not allege misconduct growing out of [their employer's] administration of the ERISA plan itself; rather, they challenge [their employer's] misrepresentations regarding their tax liability independent of the plan." (*Id.* at p. 1365.) The court concluded, "The state law fraud theory upon which plaintiffs in this case proceed that the tax advice [given] was misleading, incomplete, and fraudulent. They do not claim that [their employers] misrepresented anything about the pension plan itself, and their theory is thus independent of that plan." (*Id.* at pp. 1366-1367.) It held, "In the present case – in which ERISA applies only peripherally, if at all – it would defy common sense to allow ERISA to preempt this straightforward state law fraud claim." (*Id.* at p. 1366.) Such is not the case here.

The crux of the employees' claims is Pacific's alleged misrepresentations about the terms of an ERISA pension plan. Thus, unlike the situation in *Farr,* here the

employees' claims cannot be said to be independent of the plan. To the contrary, in order to prevail the employees' claims cannot be said to be independent of the plan. To the contrary, in order to prevail the employees had to prove the existence of the plan and explain how Pacific misrepresented the amount of benefits available. "[T]here is simply no cause of action if there is no plan."[3] (*Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 140.)

The employees argue the ERISA plan relates only peripherally to their claims because, after all, Pacific never intended to deny them their full pension benefits. Relying on *Forbus v. Sears Roebuck & Co.* (11th Cir. 1994) 30 F.3d 1402, the employees maintain state law claims seeking damages for employers with job-defeating motives, as opposed to pension-defeating motives, are not preempted. The case does not stand for this proposition. In *Forbus*, a general manager at Sears misrepresented to its employees they were going to lose their jobs in order to induce them to retire early under an early retirement benefits plan. (*Id.* at pp. 1403-1404.) The Eleventh Circuit said their fraud claim did not "relate to" an ERISA plan because it centered on "Sears' alleged fraud

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[3] For the same reason, we are also unpersuaded by the employees' argument Pacific's parent corporation is actually the "administrator" of the plan and therefore Pacific's misconduct does not sufficiently relate to an ERISA plan. They miss the point. At the heart of the employees' claims is Pacific's misconduct regarding the plan. It was not necessary that Pacific actually administer benefit payments in order for the action to "relate to" the ERISA plan.

concerning the elimination of . . . jobs, not fraud concerning an ERISA plan. . . . The plaintiffs have not claimed any fraud as it relates to the amount of pension benefits received nor have the plaintiffs made any allegation that Sears misrepresented the availability of pension benefits to the plaintiffs. Simply put, the plaintiffs contend that Sears lied when it informed them that their jobs were being eliminated." (*Id.* at p. 1406.) Consequently, the court concluded the employees' fraud claim functioned "irrespective of any [ERISA] plan" and therefore was not preempted. (*Id.* at p. 1407.)

If anything, *Forbus* defeats the employees' argument. Unlike the employees in *Forbus,* here the employees claim Pacific lied about the availability of *pension benefits.* Although Pacific's motivation may have been to eliminate the employees' jobs, their misrepresentations *related only to the pension's terms.* Thus, the alleged misconduct and the ERISA plan are inseparable. Indeed, existence of the plan is plainly "critical to the case." Accordingly, we find the employees' claims necessarily "relate to" an ERISA plan and are therefore preempted.

The employees contend this ruling will leave them without a remedy for the alleged misconduct. Not necessarily. In concluding their state law claims are preempted, we do not reach the question of whether the employees have a viable ERISA cause of action. Our records indicate they have not attempted to plead such a claim.

In any event, even if ERISA does not afford the employees a remedy, such a consequence has no bearing on whether their state tort claims are preempted. "There is simply no reason to assume that Congress intended

ERISA's preemptive reach to be coextensive with [ERISA's] civil remedial scheme." (*Olson v. General Dynamics Corp.* (9th Cir. 1991) 960 F.2d 1418, 1423.) Unfortunately, this congressionally-created gap in the law has detrimentally affected many plaintiff's claims. "The federal courts have routinely found state tort and implied contract remedies preempted [by ERISA] even when ERISA provides no substitute or the state cause of action. [Citations.] . . . [We agree] that '[t]he proliferation of ERISA preemption cases . . . raises a question as to whether ERISA is having an effect that is substantially contrary to that intended by those who favored its adoption. This is a matter which Congress may wish to examine carefully.' ([*Olson v. General Dynamics Corp.*, [*supra*, at pp.] 1424-1425 (Reinhart C.J., concurring)].)"[4] (*Barr v. American Cyanamid Co.* (W.D. Wash. 1992) 808 F.Supp. 752, 760 [employee retired based on misrepresentation employer would not thereafter implement early retirement program.)[5]

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[4] We note the same result occurred in *AT&T Communications, Inc., v. Superior Court* (1994) 21 Cal.App.4th 1673 [federal district judge remanded the case, ruling plaintiff's claims were not preempted by ERISA, but later state trial and appellate courts ruled the claims were preempted.]

[5] In light of our ruling, we need not address Pacific's alternative arguments for reversal and reduction of the economic damage award.

The judgment is reversed. Pacific shall recover its costs on appeal.

SONENSHINE, J.

WE CONCUR:

SILLS, P.J.

SCOVILLE, J.*

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* Retired Presiding Justice of the Court of Appeal, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: CV-94-0376 WJR (Sx)
Docket Number: 9

Title: Brown, et al., v. Pacific Bell

Date: March 14, 1994

Nature of Motion: (1) Plaintiffs' Motion to Remand
(2) Defendant's Motion for Summary Adjudication
(3) Defendant's Motion to Strike Plaintiffs' Demand for Jury Trial

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HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk.

TENTATIVE RULING:

The Court is inclined to GRANT the Motion to Remand and to refrain from ruling on the Motion for Summary Adjudication and the Motion to Strike Plaintiffs' Demand for Jury Trial as moot.

In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, to establish a comprehensive federal regulatory scheme for employee benefit plans. ERISA's regulatory scheme includes a preemption clause, section 514(a), which is "virtually unique" and of unparalleled breadth." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463

U.S. 1, 24 n. 26 (1983). Both the legislative history and the case law emphasize the expansive scope of ERISA pre-emption. Section 514(a) was " 'intended to apply in its broadest sense to all actions of State or local government,' " and to " 'reserv[e] to Federal authority the sole power to regulate the field of employee benefit plans.' " *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983) (*quoting* 120 Cong. Rec. 29197 (1974)).

ERISA Section 514(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Supreme Court holds that a state law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139 (1990) (*quoting Shaw*, 463 U.S. at 96-97). The seminal *Ingersoll-Rand* case held that a state claim "relates to" an ERISA plan when

> the *existence of a pension plan* is a critical factor in establishing liability under the State's [law]. . . .
>
> . . . .
>
> . . . Thus, in order to prevail, a plaintiff must plead, and the court must find, that an *ERISA plan exists and the employer had a pension-defeating motive in terminating the employment.* Because the court's inquiry must be directed to the plan, this judicially created cause of action 'relate[s] to' an ERISA plan.

Id., at 139-140 (emphasis added).

In *Ingersoll-Rand*, the Supreme Court indicates that a ERISA would preempt a state law claim when: (1) plaintiff must establish the existence of an ERISA plan to

recover under a state law; or (2) the employer had a "pension-defeating motive in terminating the employment." Although this list is not likely to be exhaustive, these factors are still highly instructive regarding the issue before the Court.

Based upon the facts and allegations contained in the papers, the Court is inclined to find that the existence of the Pacific Telesis Group Pension Plan ("the Plan") is not a critical factor in establishing liability. Furthermore, there appears to be no reason why a court would need to find that Pacific had a "pension-defeating motive" in terminating plaintiffs' employment because neither party has raised that issue here. Plaintiffs have been paid their full benefits, and allege that Pacific had only a job-defeating motive. Thus, a court could allow plaintiffs to recover without ever having to consider the Plan. In light of *Ingersoll-Rand*, ERISA would not preempt plaintiffs' state law claims because they are not "related to" an ERISA plan.

Moreover, although only a few courts have found that state claims with a de minimis tie to an ERISA benefit plan fall outside the expansive umbrella of ERISA preemption, several Supreme Court cases, including *Ingersoll-Rand*, explicitly recognize there are exceptions to section 514(a). 498 U.S. at 139 ("Notwithstanding its breadth, we have recognized limits to ERISA's pre-emption clause."). Another Supreme Court case heavily relied upon by the *Ingersoll-Rand* court, *Shaw*, notes that "some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100, n. 21 (quoted in *Van Camp v. AT&T Info. Sys.*, 963 F.2d 119,

122 (6th Cir. 1992). These opinions indicate that situations may arise in which a connection between the state cause of action and the ERISA plan is so tangential that, for the purposes of ERISA, no relationship exists.

The Court is inclined to conclude that plaintiffs' state law claims are also so remote and peripheral to the Plan that they are not preempted. Pacific has not demonstrated how these claims in any way implicate, infringe upon, or "relate to" the Plan. Thus, Pacific has failed to meet its burden of establishing preemption. *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1393 (9th Cir. 1988) (the party invoking application of the removal statute has the burden of establishing that the case presents a federal question). For this additional reason, the Court is inclined to remand this case to state court for lack of subject matter jurisdiction.

Since the Court is inclined to find that it lacks subject matter jurisdiction, Pacific's Motion for Summary Adjudication and Motion to Strike Plaintiffs' Demand for Jury Trial are both moot.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LELAND BROWN, GENE LAMBERT, MALCOLM HARWOOD, STANFORD MAGIDSON, and JOHN R. BRODRIB, Plaintiffs, vs. PACIFIC BELL, a corporation, and DOES 1 through 30, inclusive, Defendants.	Case No.: 94-0376 WJR(SX) ORDER ON PLAINTIFFS' MOTION TO REMAND; DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION; AND DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' DEMAND FOR JURY TRIAL (Mar. 24, 1994)

The above matters have come regularly before me for hearing on March 14, 1994. Appearing for the plaintiffs LELAND BROWN, GENE LAMBERT, MALCOLM HARWOOD, STANFORD MAGIDSON, and JOHN BRODRIB was Jack Smart, Esq. of the law firm of Mac-Auley & Smart. Appearing on behalf of defendant PACIFIC BELL DIRECTORY were John Y. Liu, Esq. and

Roland G. Simpson, Esq. of the law firm of Pillsbury Madison & Sutro.

Having considered the briefs filed by the respective parties and oral argument made at time of hearing, and in conformance with my Tentative Ruling made availabe [sic] to counsel prior to oral argument, a copy of which is attached hereto as Exhibit A:

IT IS HEREBY ORDERED THAT:

1. This case is remanded to state court for lack of subject matter jurisdiction;

2. Since the court has found that it lacks subject matter jurisdiction, defendant's Motion for Summary Adjudication and Motion to Strike Plaintiffs' Demand for Jury Trial are both moot.

DATED: March 23, 1994

/s/ WILLIAM J. REA
Hon. William J. Rea, Judge
United States District Court,
Central District of California

PROOF OF SERVICE

I am employed in the County of Orange, State of California and am over the age of 18 years and not a party to the within action; my business address is 23046 Avenida de la Carlota, Suite 600, Laguna Hills, California 92653.

On March 31, 1994 I served the foregoing document described as **NOTICE OF REMAND BY THE U. S. DISTRICT COURT** on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

John Y. Liu, Esq.
Roland G. Simpson, Esq.
Pillsbury Madison & Sutro
725 S. Figueroa Street, Suite 1200
Los Angeles, CA 90017-2517

I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the U.S. Postal Service. The within correspondence will be deposited with the U.S. Postal Service on the same day shown on this Declaration, in the ordinary course of business. I am the person who sealed and placed for collection and mailing the within correspondence on this date at Laguna Hills, California, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: March 31, 1994

/s/ Jean Anderson
Jean Anderson

MACAULEY & SMART
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Attorneys for Plaintiffs Leland Brown, Gene Lambert, Malcolm Harwood, Stanford Magidson, and John R. Brodrib

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

LELAND BROWN, GENE LAMBERT, MALCOLM HARWOOD, STANFORD MAGIDSON, and JOHN R. BRODRIB, Plaintiffs, vs. PACIFIC BELL, a corporation, and DOES 1 through 30, inclusive, Defendants.	Case No.: 722268 Assigned for all purposes to: Judge James H. Poole Department 16 **ORDER GRANTING SUMMARY ADJUDICATION RE DEFENDANT'S ERISA PREEMPTION DEFENSE** (Filed Feb. 6, 1995)

Plaintiffs' Motion for Summary Adjudication ordering that Plaintiffs' causes of action, and each of them, are not preempted by provisions of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1101, et seq., came on regularly for hearing on November 9, 1994, in Department 16 of the above-entitled court, the Honorable James H. Poole presiding. Plaintiffs appeared by their attorney Jack Smart, Esq., of the law

firm of MacAuley & Smart. No appearance was made on behalf of Defendant. Plaintiffs' motion, Defendant's opposition to Plaintiffs' motion, and Plaintiffs' reply to Defendant's opposition having been duly filed and considered by the court, and after oral argument having been made, the court ordered a continuance of the hearing on Plaintiffs' motion until January 11, 1995, to allow the defendant the opportunity for discovery on the specific issues presented in said motion.

This matter again came on regularly for hearing on January 11, 1995, in Department 16 of the above-entitled court, the Honorable James H. Poole presiding. Plaintiffs appeared by their attorney, Jack Smart, Esq., of the law firm of MacAuley & Smart. Defendant appeared by its attorney, John Y. Liu, Esq., of the law firm of Pillsbury Madison & Sutro. Defendant's Supplemental Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Adjudication and Plaintiffs' Reply to said Supplemental Opposition having been duly filed and considered by the court, and after oral argument made at the time of hearing, the issue of Plaintiffs' ERISA preemption defense having been argued and submitted for decision:

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

Plaintiffs' Motion for Summary Adjudication of Defendant's Eleventh Affirmative Defense (ERISA preemption as to all causes of action) in its Answer to the Complaint, is GRANTED.

ERISA preemption, as broad as it is, is not absolute. The court finds that Plaintiffs' claims are too remote,

tenuous and peripheral to the Pacific Telesis Pension Plan to be preempted. While the remand order of the Honorable William J. Rea, Judge of the U.S. District Court, is not controlling, the court finds Judge Rea's analysis helpful and on point. The Plan itself is not a critical factor in determining liability. Plaintiffs claims are not for lost rights under the Plan. Plaintiffs do not claim they failed to receive all benefits to which they were entitled under the Plan. Plaintiff claims defendant's motivation is aimed at denying Plaintiff's their jobs, not plan rights nor benefits even after having granted two additional months for Defendants to pursue discovery pertaining to this issue, Defendants have presented no evidence of a Plan defeating motive, as opposed to a job defeating motive, in the Defendant's conduct.

Plaintiff's causes of action, and each of them, are not preempted by the provisions of the Employee Retirement Income Security Act of 1974 (ERISA"), 29 U.S.C. § 1001 et seq., for the reasons stated by the court at the 1/11/95 hearing, reporters subscript thereof being attached hereto.

PRESENTED BY:

Dated: January 24, 1995

MacAULEY & SMART

By /s/ Jack Smart
Jack Smart, Esq.
Attorneys for Plaintiffs
Leland Brown, Gene Lambert,
Malcolm Harwood, Stanford
Magidson, and John R. Brodrib

CONCURRING:

Dated: January ___, 1995

PILLSBURY MADISON & SUTRO

By: _____

John Y. Liu, Esq.
Attorneys for Defendant
Pacific Bell Directory

IT IS SO ORDERED:

Dated: February 6, 1995

/s/ James H. Poole
James H. Poole
Judge of the Superior Court

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

LELAND BROWN et al., Plaintiffs and Respondents, v. PACIFIC BELL DIRECTORY, Defendant and Appellant.	G019921 (Super. Ct. No. 722268) ORDER (Filed Apr. 6, 1999)

Respondent has requested that our opinion filed on March 10, 1999, be certified for publication. The request is DENIED. The opinion follows established law and does not meet any of the standards for publication set forth in California Rules of Court, rule 976(b).

Pursuant to California Rules of court, rule 978, the clerk of this court is directed to transmit a copy of the request, our opinion, and this order to the Supreme Court. It is our recommendation that the request to publish be DENIED.

The petition for rehearing is DENIED.

SONENSHINE, J.

WE CONCUR:

SILLS, P.J.

SCOVILLE, J.*

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* Retired Presiding Justice of the Court of Appeal, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Fourth Appellate District, Division Three, No. G019921
S078355
IN THE SUPREME COURT OF CALIFORNIA

LELAND BROWN Et Al., Respondents

v.

PACIFIC BELL DIRECTORY, Appellant

(Filed May 26, 1999)

Respondents' petition for review DENIED.

Mosk, J., and Kennard, J., are of the opinion the petition should be granted.

GEORGE
Chief Justice